UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VALLEY HEALTH SYSTEM LLC, d/b/a DESERT SPRINGS HOSPITAL MEDICAL CENTER, And VALLEY HOSPITAL MEDICAL CENTER, INC., d/b/a VALLEY HOSPITAL MEDICAL CENTER and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107	Cases: 28-CA-184993 28-CA-185013 28-CA-189709 28-CA-189730 28-CA-192354 28-CA-193581 28-CA-194185 28-CA-194194 28-CA-194450 28-CA-194471 28-CA-194790 28-CA-195235 28-CA-197426 28-CA-201519

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS

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I. STATEMENT OF THE CASE

This consolidated case is a withdrawal of recognition case. Respondents withdrew recognition from three units of healthcare employees at two of its facilities in Las Vegas, Nevada. One thing is perfectly clear, the employees in the three units did not want continued union representation by the Charging Party. There is no evidence that any of the signature cards and electronically submitted cards were forged, fraudulent, invalid, or otherwise not 100% legitimate. During the lengthy hearing in this case, only one current or former employee testified on behalf of the General Counsel. That single employee testified about alleged events at a single employee meeting. The lone employee provided no testimony concerning the withdrawal cards, e-mails or related matters. The ALJ found a number of violations in his decision. These findings are in error for the reasons discussed below.

II. SUMMARY OF FACTS

This matter involves 14 consolidated cases. There are two Respondents. One Respondent, Valley Hospital Medical Center, previously had a unit of RNs represented by the Union. The registered nurses filed a decertification petition with Region 28 on January 27, 2017. The election was blocked by Region 28 on February 3, 2017. The ULP findings with regard to Valley relate to the alleged undermining of the Union and the eventual withdrawal of recognition on February 17, 2017, from the Union and matters related thereto.

Respondent Desert Springs Hospital previously had two employee units represented by the Union. The first unit was a unit of RNs. The second unit was a unit of technical employees. The ULP findings involve the alleged undermining of the Union

and the eventual withdrawal of recognition from the Union for both units and matters related thereto.

Following the withdrawal of recognition from each unit, Respondents provided wage increases to the unit employees. The wage increases raised the employee wage rates to that of non-union sister hospitals in the Valley Hospital System ("VHS")[1] in the Las Vegas area.

III. THE APPLICABLE LEGAL STANDARDS

The ALJ's decision includes a number of legal errors. The Board is not restricted in correcting errors of law contained in an ALJ decision.

The Board will not overrule an Administrative Law Judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the judge's credibility resolutions are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3rd Cir. 1951). However, the Board has cautioned that an Administrative Law Judge cannot simply ignore relevant testimony bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word "demeanor." *Permaneer Corp.,* 214 NLRB 367, 369 (1974). The Board has also noted that less weight is accorded to an Administrative Law Judge's credibility findings where the judge "omits reference to relevant testimony on critical matters and mistakenly mischaracterizes the state of the record." *Bralco Metals, Inc.*, 227 NLRB 973, fn. 4 (1977).

Courts have also expressed concern about an Administrative Law Judge's discrediting of uncontradicted testimony. In *Medline Industries v. NLRB,* 593 F.2d 788, 795 (7th Cir. 1979), the Seventh Circuit reversed an Administrative Law Judge's

[1] VHS is a downstream subsidiary of Universal Health Services ("UHS").

credibility resolutions and quoted approvingly from the Eighth Circuit case of *Banner Biscuit Co. v. NLRB*, 356 F.2d 726, 768 (8th Cir. 1966):

> An examiner may give credence and weight to the testimony of the general counsel's witnesses in preference to that of the employer. . . . But, a complete disregard for sworn testimony coupled with a tongue-in-cheek characterization of those utterances . . . depreciates the examiner's findings and obliges our close examination.

Significantly, the Board in *Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1231 (2006), reversed credibility findings where the ALJ failed to acknowledge "uncontradicted testimony." *Starcraft* at 1231 (*citation omitted*).

IV. ARGUMENT (Exceptions 1, 2, 33, 34 , 36 and 39 Apply To All Sections Below)

A. Dues Deductions (Exceptions 3)

1. Facts

In September 2016, the Hospitals ceased dues deductions because the authorization cards signed by employees at Desert Springs and Valley did not contain the appropriate authorization language. (R. 1, R. 22.) The Hospitals stopped dues deductions on September 23. (Tr. 151; G.C. 16.)

The Union uses a two-sided Membership Application and Dues Deduction Agreement which is approximately half the size of a standard 8 ½ by 11 sheet of paper. A copy of both sides of the Membership Application and Dues Deduction Agreement was introduced as Respondent Exhibit 1. (R. 1.) The Payroll Deduction Authorization provides, in part, "This authorization shall remain in effect and shall be irrevocable unless I revoke it by sending written notice to both the employer and the Union by registered mail during the period from October 1-15 on each year of the agreement and shall be automatically renewed as an irrevocable check-off from year to year unless

revoked as hereinabove provided, irrespective of whether I am a union member." A signature and date line are immediately below the above-quoted provision.

On September 14, 2016, the Hospital notified the Union, through counsel, in writing that during a review of some of the Hospitals' payroll information, the Hospital discovered that the Union's dues payroll deduction form does not comply with Section 302 of the Labor Management Relations Act (29 U.S.C. § 186). (R. 22.) Specifically, the Hospitals notified the Union that language required by Section 302(c)(4) regarding a revocation opportunity upon expiration of the applicable collective bargaining agreement is missing from the Union's payroll deduction authorization. (R. 22.) The letter explained that a review of a number of the authorizations submitted over the last six months were identical and all lacked the statutorily mandated language. (Tr. 168; R. 22.) The letter notified the Union that dues deductions would cease on Friday, September 23, 2016. (R. 22.) There were communications between the parties and the Union requested bargaining. There's no dispute Respondents refused to bargain.

The ALJ erred as a matter of law by finding the cessation of dues withholding violated the Act. The ALJ made no finding regarding the validity of the dues authorization card which was the first issue and only issue before him.

The law in this area is clear. There can be no dispute that the Union's current payroll deduction authorization does not comply with Section 302(c)(4), and that it is therefore invalid.

Section 302 of the Labor Management Relations Act (29 U.S.C. § 186), generally prohibits payments from an employer to a union, includes an express exception for the payment of union dues. Section 302(c)(4) permits an employer to deduct union dues

from employees' wages and remit those moneys to their exclusive collective-bargaining representative, "Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." 29 U.S.C. § 186(c)(4).

The starting point for any analysis of the validity of a dues deduction authorization is compliance with Section 302(c)(4). If a dues deduction authorization is invalid, the analysis stops there. This point of law is not subject to any other interpretation. The Hospitals made it clear they stood ready, willing, and able to make dues deductions provided employees submit valid dues deduction authorizations. The current dues deduction authorizations used by the Union are not valid and consequently continuing deduction of dues based upon those invalid documents constitutes an unfair labor practice on behalf of the Hospital and the Union. Further, continuing dues deductions based on the invalid dues authorizations constitutes a violation of Section 302(c)(4), which includes criminal enforcement by the United States Department of Justice. The Hospitals have not engaged in any unfair labor practice or other unlawful activity by stopping the dues deductions based on the invalid dues deduction authorization form.

Further, the Hospitals cessation of dues deductions is not the type of activity that would cause disaffection. As the Sixth Circuit Court of Appeals noted, stoppage of dues means that employees had *more* money and would be *more* likely to approve of the Union:

> The breach of the collection clause did not have a detrimental effect on the employees; it increased their take-home pay. Nor would it induce

> employee dissatisfaction with the Union; to the contrary, employees would be more likely to approve of the Union if they could enjoy its benefits without deduction of the initiation fees. Nor is there any argument that this breach would disrupt employee morale or discourage membership in the Union.

Pleasantview Nursing Home, Inc. v. NLRB, 351 F.3d 747, 764 (6th Cir. 2003).

B. Withdrawal of Recognition & Wage Increases (Exceptions 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 39)

1. Facts

The ALJ found the withdrawals of recognition were in violation of the Act. Briefly summarized the withdrawals took place after the particular Respondent received withdrawal cards and withdrawal e-mails from two employees. The cards and e-mails were verified by comparing the signatures on the cards to personnel documents and comparing e-mail and telephone records of the electronically submitted withdrawal cards. There is no dispute that for each unit, the Respondent strictly followed a well-planned set of steps to verify the accuracy of the cards. There is no evidence of forgery, fraud, or other impropriety associated with the submissions or the cards.

The ALJ made two critical legal errors with regard to evaluating whether sufficient evidence existed to establish that Charging Party had lost the support of a majority of a particular unit. First, the ALJ incorrectly determined that the electronic submissions did not satisfy a standard sufficient to where they could be relied upon. This is clear error, as the submissions satisfy standard protocol requirements for electronic signatures as well as General Counsel Memo 15-08. Secondly, the ALJ determined that some of the cards couldn't be determined to be genuine or authentic because of the variation of the signature on the card and the signatures contained in personnel records. The ALJ failed to provide any explanation as to why any of the cards were found not to

be genuine or authentic. The opinion simply lists cards as cards that should not be counted. There was no evidence that Respondents were unable to determine the signatures of any of the cards when comparing the cards to the personnel documents. There is a wealth of undisputed testimony from Respondents officials as to the meticulous process they followed in determining whether a signature was valid. The ALJ, without a specific finding, simply dismisses this notion. Further, the ALJ does so while listing the particular employees whose cards he believed cannot be determined with any reasonable degree of certainty to be genuine or authentic. Where there is no evidence of forgery, fraud, or other impropriety the cards should be presumed valid.

a. Valley Withdrawal

In January 2017, Valley learned that there was an active decertification campaign underway. (Tr. 63.) On January 27, outside counsel for the respondents, Thomas Keim, received notice that RNs at Valley filed a decertification petition. (Tr. 1038.) Due to an error, the petition was refiled on January 31. (Tr. 1039.) The Region blocked the RN's decertification petition. (Tr. 1039.)

On February 17, Valley's Chief Nursing Officer, Victoria Barnthouse, received a call from RN Richel Burog in which Burog asked to meet with Barnthouse. (Tr. 175.) Barnthouse met with Burog and RN Jennifer Yant at around 9 a.m. that morning. (Tr. 175, 765.) During that meeting, the RNs informed Barnthouse that more than 50% of the RNs in the unit no longer wished to be represented by the Union, and they presented Barnthouse a manila envelope that contained cards and electronic submissions. (Tr. 175, 765, 776, 786; R. 27, R. 28.)

Barnthouse immediately contacted Jeanne Schmid, Staff Vice President, Labor Relations for UHS. (Tr. 52.) Keim was notified shortly thereafter. (Tr. 1040.) On his

way to meet with Schmid and Barnthouse, Keim stopped by the human resources ("HR") office and obtained a list of current employees from Dana Thorne, Director of HR for Valley. (Tr. 1040.) Keim also asked Thorne to find two managers who did not have RNs as direct reports to be available. (Tr. 1047.) Thorne identified Nursing Project Manager Kimberly Crocker and Respiratory, EKG, and Voluntary Services Manager Annette Litton to assist. (Tr. 831, 1048.)

Keim, Schmid, and Barnthouse took the envelope into a conference room in the administration office. (Tr. 1041.) Keim instructed Barnthouse to empty the contents of the envelope onto the center of the table. (Tr. 1041.) The contents included decertification cards with handwritten signatures, as well as a stack of 8.5-inch by 11-inch pieces of paper that were electronic submissions. (Tr. 1041; R. 27, R. 28.) The decertification cards stated:

> I am an RN at Valley Hospital Medical Center and No longer wish to be Represented by SEIU (SERVICE EMPLOYEES INTERNATIONAL UNION) local 1107 for the purpose of collective bargaining with my employer.

The card then had a place for each employee to write her/his name, signature, and date. (See, R. 27.) The electronic submissions were copies of emails received by Burog from a company called Typeform. (R. 28.) Each electronic submission included fields in which the person who completed the form inserted their (1) first and last name, (2) email address, (3) phone number, (4) the name of their employer, (5) a response to the question, "Do you agree that you no longer wish to be represented by Service Employees International Union Local 1107 (SEIU 1107) for the purposes of collective bargaining?", and (6) the date submitted. (See, R. 28.)

In the administrative conference room, Keim wrote each letter of the alphabet on a stack of post-it notes and placed them around the conference room table. (Tr. 1042.) Schmid and Barnthouse separated the cards based on the employee's last name (*i.e.*, all of the employees whose last names began with "A" were placed in the "A" stack, etc.). (Tr. 1042.) After they were separated, the cards corresponding to each letter were alphabetized. (Tr. 1044.) When they came across a duplicate, they analyzed the cards to determine which card should be used for verification. (Tr. 1044.) Once they removed the duplicates, Keim highlighted in yellow the number beside the name of each employee who signed a card. (Tr. 1044-45; R. 29, R. 31.)

While Schmid and Barnthouse were separating and alphabetizing the cards, Keim took the electronic documents and numbered each submission. (Tr. 1043.) He used a pink highlighter to highlight the names of each employee on the employee list who submitted an electronic document. (Tr. 1043; R. 31.)

Keim then made color copies of the employee lists. (Tr. 1046; R. 29, R. 31.) They placed all of the cards and electronic documents in an envelope and took them to HR. (Tr. 1046-47.) When they arrived in HR, Keim provided instructions on how to review the signatures on the decertification cards. (Tr. 1048.) Keim assigned Litton the first half of the alphabet, beginning with the "A's" and Crocker the second half, beginning with the "L's." (Tr. 817, 832, 1048; R. 29, R. 31.) Thorne, with assistance from her HR staff, obtained the personnel files for each person who signed a card. (Tr. 242-43, 1048.) Crocker and Litton then compared the signature on each card with three signatures in each employee's personnel file. (Tr. 243, 265, 832, 1048; Compare R. 27 with R. 21.) Crocker and Litton confirmed that they verified the signature of each card

for which they were responsible. (Tr. 821, 835.) If the signatures matched, they indicated the match with a red checkmark on the employee list. (Tr. 249-50, 833, 817; R. 31.)

While Crocker and Litton were comparing signatures, Keim validated the electronic submissions. To validate the electronic submissions, he compared the name, email address, and phone number submitted on the electronic document with the information contained on Valley Hospital's Voter List (prepared in anticipation of an election). (Tr. 1049-50; Compare R. 28 with R. 48.)

Once Crocker and Litton finished validating signatures on cards, they counted, then double checked, the total number of signatures (including the electronic submissions) and included that information on "Count Sheets." (Tr. 822, 837, 1050, R. 30, R. 32.) Keim signed each count sheet as a witness. (Tr. 1050.) Out of 533[2] bargaining unit members, 287[3] had signed cards indicating that they no longer wanted to be represented by the Union. (R. 30, R. 32.)

Following the counts, Keim took the cards, electronic submissions, count sheets, and employee lists back to Barnthouse's office. (Tr. 1051.) As a result of the count, Valley notified the Union that it withdrew recognition. (Tr. 1051.) Shortly thereafter, Valley informed its RNs of the withdrawal. (G.C. 24.)

[2] Although the Employee List contained the names of 534 employees, there were actually only 533 because one employee, Gloria Kent-Weaver (number 270), had been terminated at the time of withdrawal. (Tr. 1073.)

[3] Crocker's vote count included 154 (R. 30) and Litton's vote count included 133 (R. 32) (including electronic submissions) for a total of 287.

b. Desert RN Withdrawal

On March 11, McNutt received a call from Desert Springs RN Courtney Farese. (Tr. 195.) Farese requested to meet with Desert Springs' Chief Nursing Officer, Elena McNutt, and McNutt met with Farese and two other RNs on the morning of March 12. (Tr. 195-96.) McNutt notified Keim of Farese's request. (Tr. 1051-52.)[4] Keim was aware that a group of RNs were seeking to decertify the Union. Having gone through the withdrawal process at Valley, and because Farese was an open and outspoken anti-union employee, Keim assumed that the purpose of the meeting would be for the employees to present decertification cards. (Tr. 1051-52, 1098.) Keim instructed McNutt to find two managers who did not have any RN direct reports. (Tr. 1052.) McNutt chose Director of Business Development Michele Crawford and Director of Biomedical Engineering Kent Forsythe. (Tr. 1052.) In anticipation of the meeting, Keim also obtained a list of all of the bargaining unit members from HR. (Tr. 1053.)

On March 12, Farese notified McNutt that she was presenting cards from a majority of RNs in the unit saying that they no longer wanted to be represented by the Union. (Tr. 196; R. 35.) She presented an envelope that contained signed decertification cards, electronic submissions, and a stapled four-page petition. (Tr. 107, 1054-56, R. 33, R. 35, R. 37.)

From there, Desert Springs followed the same counting and validation process as at Valley. (Tr. 1052.) The signatures were verified and the electronic submissions were verified as well. Desert Springs determined that out of 439 bargaining unit members,

[4] McNutt was familiar with the decertification effort at Desert Springs because she had seen flyers. (Tr. 222.) She had not spoken with any RNs about the effort. (Tr. 223.)

230[5] had signed cards indicating that they no longer wanted to be represented by the Union. (R. 37, R. 38, R. 39, R. 42.)

Following the count, Keim informed McNutt that there were sufficient signatures to withdraw recognition. (Tr. 214, 1059.) Desert Springs notified the Union of the withdrawal then sent a letter to RNs the same night notifying them that the Hospital withdrew recognition. (Tr. 215, 1059; G.C. 27.) Subsequently, Desert Springs notified the RNs about upcoming wage increases. (Tr. 115; G.C. 9.) The RNs' wages were increased to bring them in line with non-union hospitals in VHS. (Tr. 116.)

c. Desert Tech Withdrawal

On Friday, March 17, McNutt received a call from Respiratory Therapist Andrea Ormonata asking to meet with McNutt the next day. (Tr. 216, 221.) McNutt notified Keim about the call and Keim requested from HR a current list of all employees in the bargaining unit. (Tr. 1060; R. 40.)

On Saturday, March 18, McNutt met with Ormonata and Farese and Ormonata and Farese informed McNutt that they received decertification cards signed by a majority of employees in Desert Springs' Tech Unit. (Tr. 216.) Ormonata provided McNutt both electronic submissions and signed cards. (Tr. 117-18; R. 34, R. 36.) McNutt accepted the cards and then called Keim and Schmid. (Tr. 116, 217, 1060.)

After receipt, Desert Springs followed the same procedure as with the RN Unit. The signatures were verified and the electronic submissions were verified. Desert

[5] Crawford's vote count included 62 (R. 39), Forsythe's vote count included 88 (R. 42). Crawford included Elena Petrinca (from the signed petition) on her Count Sheet (*see* R. 38, p. 7), but Forsythe did not include Vanessa Carroll or Hollie Cato on his Count Sheet (*see* R. 38, p. 2), which adds two more signatures (Carroll and Cato) to the total count. Keim counted 78 electronic submissions. (R. 38.) Thus, the total came to 230 out of 439.

Springs confirmed that out of 95 bargaining unit members, 53[6] had signed cards indicating that they no longer wanted to be represented by the Union. (R. 40.)

Keim securely maintained custody of all of the original cards and electronic submissions from the time they were submitted to the Hospitals until they were offered into evidence in this case. (Tr. 1063.)

2. Argument and Analysis

a. Standard for Withdrawal

The applicable standard for withdrawal was set forth in *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001). Under *Levitz*, "an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Id.* The employer must meet its burden by a preponderance of the evidence. *Id.* Here, the Hospitals withdrew recognition based on valid cards that were presented to them by bargaining unit employees. These cards demonstrated that "the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Id.* Respondents argue this case under the existing standard, but also argue the pre-*Levitz* standard is the more appropriate standard.

b. Signed Cards and Petition

At the outset, it is important to note the distinction between authenticating cards for the purpose of admissibility at the hearing versus authenticating cards for the purpose of providing an employer with a basis for withdrawing recognition. The Board has held that for purposes of providing an *employer* with a basis for withdrawing recognition, an

[6] Crawford's vote count included 20 (R. 41), Tran's vote count included 22 (R. 43), and Keim's count of electronic submissions included 11 (R. 40), for a total of 53.

employer can authenticate cards by comparing the signatures contained on the decertification cards against signatures contained in employees' personnel files. *See, e.g.*, *Hartz Mountain Corp.*, 295 NLRB 418, 424 (1989), *Consolidated Biscuit Co.*, 1996 NLRB LEXIS 668, *43 (1996).

Here, the Hospitals demonstrated that *each* signature was authenticated by a manager (who did not have any RN direct reports) by painstakingly comparing the signature on the card (or petition) to *three* signatures contained in each employee's personnel file. Crocker and Litton each testified about the authentication process for the Valley RN Unit and testified that they authenticated each card that they were assigned. Crawford and Forsythe likewise confirmed that they verified the signatures of each card they were assigned for the Desert Springs RN Unit. Crawford and Tran confirmed that they authenticated every signature for the Desert Springs Tech Unit. This authentication process clearly complied with the Board's standards. *See Hartz Mountain.*

c. Electronic Submissions

The Hospitals also relied upon electronic submissions to withdraw recognition from the Union. RN Courtney Farese explained, in detail, how the electronic submissions were generated. Farese worked as an RN in the emergency room and was in the Desert Springs RN Unit. (Tr. 854.) She led the decertification effort for both units at Desert Springs and set up the electronic submission process for both Desert Springs and Valley. In September 2016, when Farese became involved in the decertification effort at Desert Springs, she believed that there had to be a more modern and efficient way to obtain signatures than using a paper petition and cards. (Tr. 858, 861.) She performed research on the Internet – specifically, the NLRB's website, which was recommended by the National Right to Work Foundation – and determined that if there was a confirmation that

could be received by the person who completed the submission, that was sufficient as a signature for a decertification petition. (Tr. 859-60.) She selected the company "Typeform" because it provided a platform that allowed this confirmation process. (Tr. 860.) Specifically, she testified:

> So I found this format, I found a platform that would allow me to execute on that format and that is what this is. This is somebody that put in the information. That's specific to an individual. These are email addresses, telephone numbers. These aren't things that just anybody has. The individual has this information and they receive a confirmation back saying that their information has been received.

(Tr. 860.) As Farese noted, once an employee submitted her/his information, that person received an email confirmation that contained the information that they submitted. "If they agreed with all of the information, there was nothing that they had to do. If they disagreed with it or wanted [their] name removed all they had to do was reply to the email." (Tr. 861.) An example of the confirmation email that the *employee* receives is the electronic submission of Farese, which specifically says "If you did NOT submit this authorization, please immediately reply to this email and let me know that you did not submit the authorization." (R. 33, p. 57.) That email confirmation also instructs the person who submitted the form that if any information is incorrect to reply with the "corrected information." (R. 33, p. 57.) On the few occasions that employees did contact Farese to modify their submissions, she honored their requests. (Tr. 860, 896-97.)

Employees were able to access the Typeform petition through a link on Farese's Facebook page. (Tr. 861-62.) She distributed flyers in break rooms that contained a QR scanner code. (Tr. 862.) Once the code is scanned, the user is taken directly to a website – in this case, to Farese's Facebook page. (Tr. 862.) That page, in turn, had a link to the Typeform petition. (Tr. 862.) Once an employee completed information on the

Typeform site, Typeform automatically sent one confirmation email to the person who completed the form and then sent an identical copy to Farese's personal email account – courtneyfarese@gmail.com. (Tr. 863.)

Farese was also involved with the decertification effort at Valley. (Tr. 877.) She was familiar with Valley because she occasionally covered shifts there and had several friends who worked there, including Burog and Jennifer Yant. (Tr. 877-78.) Farese helped set up a Facebook page advocating for decertification at Valley and created a QR scanner code and Typeform account for Valley identical to the one she set up at Desert Springs. (Tr. 877-78.) She set up Valley's Typeform account so that the confirmation emails went to Burog's personal email account at richel.burog@gmail.com. (Tr. 878; R. 28.)

Farese received each electronic submission and provided printed copies of those emails to Desert Springs, along with all of the handwritten cards and the multi-page petition, when she met with McNutt on March 12, and then again on March 18. (Tr. 863, 876, 883-84, 889; R. 33-37.) Burog provided copies of the electronic submissions that she received to Barnthouse on February 17. (Tr. 786; R. 28.)

As set forth above, under *Levitz*, an employer may lawfully withdraw recognition so long as it has objective evidence of a union's actual loss of majority support. Historically, employers have met this burden by demonstrating that a majority of employees in a unit signed a hard copy of a petition. *See, e.g.*, *Renal Care of Buffalo, Inc.*, 347 NLRB 1284 (2006). However, neither *Levitz* nor any other cases require *handwritten* signatures.

Respondents reasonably relied upon the electronic submissions. All of the electronic submissions were dated within the year immediately preceding each hospitals' withdrawal of recognition. The submissions unequivocally affirmed that the employee "no longer wish[ed] to be represented by" the Union. Keim verified the submissions by comparing the name, email address, and phone number contained on the electronic card to the information that he prepared in response to the Union's information request. (Tr. 1070.) If the email or the phone number matched, he considered the card to be valid. (Tr. 1070.) There were three employees in the Desert Springs RN Unit and one in the Desert Springs Tech Unit whose names were not on the verification list that Keim was using (which was prepared on February 23 in response to the Union's January Request). For those four people, Keim contacted the scheduling department and determined that the individuals had been recently hired, were current employees, and were scheduled to work. (Tr. 1070-71.)

Respondents' Exhibits 28 (Valley RN Unit Electronic Submissions), 33 (Desert Springs RN Unit Electronic Submissions), and 34 (Desert Springs Tech Unit Electronic Submissions), were properly authenticated at the hearing under Federal Rules of Evidence 901(b)(4) and 901(b)(9). *See* Fed.R.Evid. 901(b). Rule 901(b)(4) is "one of the most frequently used [rules] to authenticate e[]mail and other electronic records." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007). The rule states that evidence may be authenticated or identified by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed.R.Evid. 901(b)(4). A party wishing to prove authentication under 901(b)(4) may introduce circumstantial evidence proving its trustworthiness, or the court

can find the evidence is sufficiently authenticated solely based on its characteristics. *See Smith v. Harrington*, 2015 U.S. Dist. LEXIS 30020, at *8 (N.D. Cal. 2015) (holding that a transcript of a school board hearing was properly authenticated under 901(b)(4) when the witness testified as to how he ordered the transcript and when he received it); *Hollis v. Sloan*, 2012 U.S. Dist. LEXIS 153681, at *15 (E.D. Cal. 2012) (holding that medical records were sufficiently authenticated because they were "clearly medical in nature, specific to [the] plaintiff, with dates of entry by medical personnel").

Similarly, the exhibits were authenticated under Rule 901(b)(9), which states that evidence may be authenticated by "describing a process or system and showing that it produces an accurate result." Fed.R.Evid. 901(b)(9). The description of the process or system need only be made by someone familiar with the program. *See U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1045 (9th Cir. 2009) ("It is not necessary that the computer programmer testify in order to authenticate computer-generated documents."); *United States v. Lopez*, 624 F.3d 1198, 1200 (9th Cir. 2010) (holding testimony by an agent who was familiar with a program was enough to establish the authenticity of the program's results).

Farese testified regarding how she researched the requirements for electronic signatures under the NLRA, chose Typeform over other online form providers, set up the website for both Hospitals, and had confirmation emails sent to both herself and to the employee who had filled out the form. (Tr. 858-866). The Typeform program automatically sent to each employee a confirmation email that mirrors an example set out in the NLRB General Counsel's Memorandum from October 26, 2015. *See* Memorandum from NLRB Gen. Counsel Richard R. Griffin, G.C. 15-08, Example 4

(Revised Oct. 26 2015) and Respondent Exhibit 33, p. 57. Based on Ms. Farese's testimony, the emails were properly admitted under Rule 901(b)(9) because she sufficiently described the process by which the Typeform program operates. Furthermore, the emails are also authentic pursuant to Rule 901(b)(4) given the circumstantial evidence introduced by Ms. Farese. As discussed previously, the distinct characteristics of the emails, such as their inclusion of each employee's name, phone number, employer, and the date of submission, in conjunction with Ms. Farese's testimony provides sufficient information to establish authenticity.

Moreover, the ALJ overruled hearsay objections to Respondents Exhibits 28, 33, and 34. Even if the electronic submissions were inadmissible hearsay that would not undermine their admissibility to the extent that they were introduced as the evidence upon which the Respondents relied to withdraw recognition. In accordance with *Levitz*, an employer may lawfully withdraw recognition so long as it has objective evidence of a union's actual loss of majority support. The electronic submissions are the objective evidence upon which Respondents relied to withdraw recognition of the various units (in addition to the handwritten cards). Respondents are not required to introduce each electronic submission for the "truth of the matter asserted."

d. The Hospitals Were Required to Withdraw Recognition Based on Objective Evidence that the Union Lost Support from a Majority of Employees in Each Unit

Following the procedures set forth above, Valley found that out of 533 bargaining unit members, 287 had signed cards indicating that they no longer wanted to be represented by the Union. (*See* R. 30, R. 32.) Desert Springs determined that out of 439 RNs, 230 had signed cards indicating that they no longer wanted to be represented by the Union. (*See* R. 37, R. 38, R. 39, R. 42.) Desert Springs confirmed that out of 95 techs,

53 had signed cards indicating that they no longer wanted to be represented by the Union. (*See* R. 40.) In each unit, a majority of employees signed cards or an electronic petition stating that they no longer wished to be represented by the Union for purposes of collective bargaining. Therefore, withdrawal of recognition was lawful and required. *See, e.g.*, *Renal Care of Buffalo*, 347 NLRB 1284.

e. The Hospitals Were Not Obligated to Bargain Over Wage Increases, or the Effects of the Wage Increases, Because the Union Was No Longer the Employees' Representative

The ALJ found that each of the Respondents granted employees wage increases without bargaining with the Union over the wage increases. However, as explained above, Respondents did not grant wage increases until *after* they withdrew recognition from the Union. As explained above, Valley and Desert Springs are part of VHS, which includes four other hospitals in which the RNs and techs do not belong to a union. (Tr. 54, 135.) Employees at those hospitals are paid based on a pay scale that applies to non-union employees. Once Valley and Desert Springs withdrew recognition, they were able to easily adjust the pay for employees formerly represented by the Union by placing them on VHS' pay scale for non-union RNs and techs. (Tr. 77, 116, 120.)

It is well-established that an employer is not required to bargain with a union once it has withdrawn recognition. *See, e.g. Mkt. Place, Inc.*, 304 NLRB 995, 1243 (1991) ("In view of my findings concerning the Respondent's lawful withdrawal of recognition, I further find that there was no bargaining obligation…."). Here, the Respondents lawfully withdrew recognition on February 17 (Valley RN Unit), March 12 (Desert Springs RN Unit), and March 18 (Desert Springs Tech Unit). Therefore, Respondents had no obligation to bargain with the Union over wage changes that they announced *after* they lawfully withdrew recognition.

C. Bulletin Boards (Exceptions 1, 2, 5, 6)

1. The ALJ failed to apply the bulletin board provision of the CBAs in deciding whether Respondents violated the Act.

Each Unit had a separate CBA, and each of those CBAs contained an article called "Bulletin Boards." (See G.C. 12, Article 16; G.C. 13, Article 7; G.C. 14; Article 7.) The Bulletin Board article (Article 16) from the Valley 2013-2016 CBA includes the following language:

> Any materials being posted must be dated and signed by the Union representative responsible for the posting and a copy of the material being posted will be hand delivered to the Human Resources Administrator or his/her designee, for review, prior to posting. No material which contains personal attacks upon any other member or any other employee or which is critical of the hospital, its management, or its policies or practices, will be posted.

(G.C. 12, Article 16.)

The Bulletin Board provisions contained in the Desert Springs RN and Tech CBAs are nearly identical. Those provisions state:

> Any materials being posted must be dated and signed by the Union representative responsible for the posting and a copy of the material being posted will be hand delivered to the Human Resource [sic] Director, or his/her designee, prior to posting. No material which contains personal attacks upon any other member or any other employee or which is critical of the hospital, its management, or its policies or practices, will be posted.

(G.C. 13-14, Article 6.)

The Bulletin Board provision remained essentially unchanged since at least 2006 at Valley Hospital. (R. 2-3.) At Desert Springs Hospital, the Bulletin Board provision remained unchanged since at least 2007, and the relevant portion of the Bulletin Board article dates back to the 1995-1997 CBA. (R. 4.)

Wayne Cassard is the System Director of Human Resources for VHS. (Tr. 134.) He and Thorne testified that for as long as they had worked for the Hospitals, the practice

at both Hospitals was for the Union to send the Hospitals a draft of the notice that the Union planned to post on its bulletin board. Thereafter, the Hospitals reviewed the postings and informed the Union whether or not they approved the posting. The Hospitals provided numerous examples of this approval process during the hearing. Those include:

- September 18, 2009: Union representative Rose Pomidoro sent a fax that contained a notice she planned to post. The fax stated: "The flyers I might post. **Please E-mail letting me know they are an OK**." (Tr. 674.)

- September 21, 2009: Union representative Rose Pomidoro provided flyers to Cassard, Thorne, and Angelique Davison (the former HR Generalist at Desert Springs) saying "Here is your copy, **if you have a problem with them please let me know by tomorrow morning**." (Tr. 597, R. 5.)

- April 3, 2013: Thorne notified Union representative Dolores Bodie that the Hospital found unapproved postings and that "they have been removed…." (Tr. 675; R. 16-17.) Bodie responded saying that she "**will continue to send you copies of anything we wish to post in the hospital, per the CBA**." (R. 16-17.)

- August 19, 2015: Valley Hospital HR Generalist Leslie Irwin notified several union representatives that an organizing flyer was prohibited by the CBA. (Tr. 607, 622; R. 9.)

- July 6, 2016: Union representative Lanita Troyano provided a flyer to Cassard. Cassard responded notifying Troyano that the flyer violated the CBA. (Tr. 599; R. 6.) Cassard rejected the flyer because it was critical of the Hospitals in violation of the CBA (e.g., it accused VHS of "keeping [employees] in the dark" and "brainwashing" employees, issuing "gag orders," and making "dangerous proposals"). (Tr. 599; R. 6.)

If a flyer was approved, HR notified management that the flyer was approved and could be posted. (Tr. 600-01; R. 7.) When the Hospitals did not approve a flyer, their past practice was always to notify managers that the flyers were not approved and to remove them if found posted in the Hospitals, which had happened in the past. (Tr. 618.) Over the years, various managers brought Thorne unapproved postings that they had removed from bulletin boards. (Tr. 680.) For example:

- October 23, 2015: Cassard rejected a flyer from the Union on the basis that the flyer disparaged "corporations." Thorne responded saying that she told the Union representative that she could not post the flyer, that it "will not be up at Valley," and that she will "send a notice around just in case." (R. 8.)

- May 20, 2016: Thorne notified Valley Hospital management of a Union flyer that could not be posted and instructed management to "remove any that you see and let me know about them." (R. 18, pp. 1-2.)

- June 27, 2016: Thorne instructed Valley Hospital management to "make sure" to remove a Union flyer that was critical of the Hospital. (R. 18, pp. 3-4.)

- July 6, 2016: Thorne again instructed Valley Hospital management to remove a flyer that was critical of the Hospital. (R. 18, pp. 5-6.)

The Union never grieved the removal of any flyers. (Tr. 681.)

In May 2016, Troyano sent Cassard an e-mail with a flyer attached that the Union sought to post. (R. 10, p. 4.) The flyer accused the Hospitals of hoping that employees did not understand the difference between "removing outdated provisions" and "scrapping hard fought protections." (R. 10, p. 9.) The flyer also erroneously implied that the Hospitals were intimidating employees by saying "FIGHT WORKER INTIMIDATION!" (R. 10, p. 9.) Cassard responded by denying the Union's request to post the flyer on the basis that the flyer was critical of the Hospital, its management, or its policies or practices. (R. 10, pp. 1-3.) In response to this email, the Union claimed that the posting was not "critical of management." (R. 10, p. 1.) Astoundingly, for the first time, the Union also took the position that the contract did not require approval of the flyer. (Tr. 698, 703-04; R. 10, p. 1.)

Despite this assertion, on August 16, 2016, Troyano sent Cassard an email with another flyer attached that the Union sought to post. (R. 11, p. 2.) Cassard rejected the Union's request because the flyer falsely accused the Hospitals of making "regressive"

proposals and because it contained information that was critical of the Hospitals. (R. 11, p. 1.) Troyano responded that "It seems unfair that the flyers UHS puts out can say whatever they want about the Union. We are putting out what we believe is to be true." (R. 11, p. 1.)

On August 8, 2016, Troyano sent Cassard an email that included a flyer titled "VHS Fiction vs. Union Facts." The flyer accused VHS of spreading what the Union considered to be "fiction." The flyer also:

- Claimed that "VHS'[s] July 28, 2016 bargaining brief distort[ed] what [was] really going on at negotiations."
- Characterized VHS's proposal as being "designed to punish employees rather than reward them for great patient care."
- Claimed that "VHS seems to care more about money than its own employees at Desert Springs and Valley Hospitals."

(G.C. 17.) On August 9, 2016, Cassard informed Troyano that the flyer violated the CBAs and would be removed. (Tr. 154; G.C. 17.) Cassard specifically told Troyano that the flyer violated the Bulletin Board provisions of the CBAs.

On October 3, 2016, Troyano sent Cassard an email with an additional flyer. (Tr. 155; G.C. 18.) This flyer falsely accused the Hospital of walking out of negotiations. In bold letters at the top, the flyer stated "UHS Walks Out!" (*Id.*) Cassard notified Troyano that the flyer violated the CBA because it misstated the discussion and requests at the bargaining table. (G.C. 18.)

On October 7, 2016, Troyano sent Cassard another email. (Tr. 156; G.C. 19.) This time, the Union's flyer stated "UHS IS DICTATING YOUR RIGHTS!" (G.C. 19.) Cassard informed Troyano that the flyer was not authorized and would be removed. (Tr. 156; G.C. 19.)

On October 20, 2016, Troyano sent Cassard another email notifying him that the Union planned to post a flyer that stated: "VHS WALKS AGAIN!" and "VHS is dragging its feet, forwarding unacceptable contract proposals in an effort to draw out bargaining and bust the Union." (G.C. 20.) Cassard notified Troyano that the posting violated the CBA and would be removed. (Tr. 157; G.C. 20.)

2. Argument and Analysis

The ALJ erred in finding the practice of requiring pre-approval and the denial of the requests to post violated the Act. As an initial matter, the ALJ refused to apply the plain meaning of the CBAs articles on Bulletin Boards. The ALJ erred by substituting his own judgment for a negotiated contract provision he didn't like.

The language of the CBA is clear – the Union must provide the Hospitals with a copy of the material being posted prior to posting and it cannot post prohibited materials. The Board has routinely held that where contract language is clear, the terms are given their plain and ordinary meaning. *See, e.g., J.R.R. Realty Co.*, 301 NLRB 473, 475 (1991.) The Articles provide a process for posting. By ignoring the plain meaning of the article, the ALJ rendered the provisions meaningless.

Second, to the extent that there is any ambiguity in the CBA, the evidence clearly demonstrated that the parties' past practice was for the Hospitals to review materials provided by the Union, notify the Union if the materials were approved or not, and remove postings that were not approved. The above undisputed evidence was ignored by the ALJ.

On August 9, 2016, October 3, 2016, October 7, 2016, and October 20, 2016, Union representative Troyano provided the Hospitals with copies of flyers that she planned to post. In each case, Cassard reviewed the flyers and determined that they were

"critical of the Hospital." On this basis, he notified the Union that the flyers could not be posted and/or that they would be removed. In doing so, the Hospitals did not deviate in any way from years of past practice interpreting the exact same language of the CBA. As the Hospitals did not deviate from their past practice, they did not violate the Act and the ALJ's finding is in error.

a. The Alleged Bulletin Board Infractions Did Not Cause a Loss of Majority Support for the Union

The ALJ erroneously found that by instructing the Union that it could not post flyers, by removing flyers, and by refusing to negotiate with the Union over the removal, the Hospitals caused a loss of majority support for the Union. (GC Ex. 1(pp), para. 7(m), 7(q), 7(v).)

As the Board stated in *Master Slack*:

> [T]he law is equally well settled that an employer may not avoid its duty to bargain by relying on any loss of majority status attributable to his own unfair labor practices. Thus, it is clear that prior unremedied unfair labor practices remove as a lawful basis for an employer's withdrawal of recognition the existence of a decertification petition or any other evidence of lost union support which, in other circumstances, might be considered as providing objective considerations demonstrating a free and voluntary choice on the part of employees to withdraw their support of the labor organization. However, the unfair labor practices must be of a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. Stated differently, the unfair labor practices must have caused the employee disaffection here or at least had a "meaningful impact" in bringing about that disaffection. In short, there must be a causal relationship between the unlawful conduct and the petition of August-September 1982.

271 NLRB 78, 84 (1984) (internal citations omitted). The Board uses four factors to determine whether a causal relationship exists between the unlawful conduct and the petition:

> 1) the length of time between the unfair labor practices and the withdrawal of recognition; 2) the nature of the illegal acts, including the possibility of their

> detrimental or lasting effect on employees; 3) any possible tendency to cause employee disaffection from the union; and 4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Id.

Here, there is no evidence that demonstrates a causal relationship between the alleged unlawful conduct and the petition. With respect to the timing, the incidents occurred in August and October of 2016, between four and seven months before the Hospitals withdrew recognition. The Board has noted that five to six months weighs against a causal connection. *See Champion Enterprises, Inc.*, 350 NLRB 788, *19-20 (2007).

Second, the removal of (and prohibition on) Union flyers is not the kind of act that would cause a detrimental or lasting effect on employees. The Board has found incidents such as discharge of active union employees, direct dealing, and bypassing union representatives to be the kinds of hallmark violations that are likely to have a lasting negative effect on employees. *See, e.g., Goya Foods of Florida*, 347 NLRB 1118, 1121-22 (2006). On the other hand, the Board has specifically held that the removal of materials from a union's bulletin board is insufficient to cause employees to decertify a union. *See Renal Care of Buffalo, Inc.*, 347 NLRB 1284 (2006).

Third, the Union did not present any evidence that the removal of flyers caused disaffection from the Union. When the Union fails to provide evidence of the unlawful conduct's effect on employees, it weighs against the existence of a causal relationship. *See Champion*, 350 NLRB 788, at 21-22; *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1297 (2006). Here there is no evidence that employees signed petitions because of the removal of flyers – or that any employees were even aware of the removal of any flyers.

Fourth, CGC did not present any evidence to demonstrate that the removal of flyers had any effect on employee morale, organizational activities, or membership in the Union. For these reasons, even if the Hospitals did violate the Act, those violations did not cause a loss of majority support for the Union.

D. Valley Orientation (Exceptions 1, 2, 6)

1. Facts

Kimberly Crocker is the Nursing Project Manager for Valley and is responsible for orientation for all new hires. (Tr. 258, 809.) Orientation occurs on the first and third Thursday of every month and includes new hires in all positions (*e.g.*, RNs, therapists, pharmacists, managers, etc.). (Tr. 809-10.) The CBA provides the Union with an opportunity to present to any interested RNs during orientation. (Tr. 810.) RNs' attendance at the Union's portion of orientation is voluntary – they can choose whether or not to attend. (Tr. 810.)

In August 2016, Valley changed the orientation start time, prospectively, from noon to 2:15 p.m. (Tr. 671; R. 13.) Thorne notified Troyano of this change by email. (Tr. 671; R. 13.) Thorne also notified Troyano of all of the orientation dates in 2017. (Tr. 672; R. 14.) Although the Union was aware of the dates and start times for orientation, Crocker had not witnessed any representatives from the Union at a single orientation since, at least, August 2016. (Tr. 813.)

Orientation was scheduled for February 2, 2017. (Tr. 259.) Crocker was observing another presenter when two Union representatives, Romina Loreto and Natalie Hernandez, arrived at approximately 12:15 p.m. (Tr. 283, 813-14.) Crocker reminded the representatives that they were to present at 2:15 p.m. and the representatives told Crocker that they would wait. (Tr. 814.)

On February 2, approximately ten employees attended orientation, but only two of them were RNs. (Tr. 331.) At 2:10 p.m., Crocker dismissed the non-RN staff and notified the RNs that it was time for the Union representatives to present. As Crocker explained:

> So at 2:10, I dismissed the staff. And there was [sic] the two RNs that were still in the class on the right hand side. And I approached them just to let them know that the Union was here and that they were going to present at 2:15 to them. And one of the RNs, Gerome, asked me if he had to stay.
>
> And I told Gerome, I said, "That is up to you. I can't force you to stay."
>
> And he said, "I don't want to stay."
>
> And then the other RN, Nichole said, "I don't want to stay either." And they started to pick up and gather their stuff.

(Tr. 814-15.) After this exchange, Crocker and the RNs exited the classroom and encountered the two Union representatives in the hallway. (Tr. 815.) Crocker informed the Union representatives that the RNs did not want to stay. (Tr. 815.) Loreto asked who the RNs were, and Crocker provided their names. (Tr. 815.) Crocker also pointed out one of the RNs, Gerome, to Loreto, but Loreto said "We've already spoken to him." (Tr. 815.) At that point, the Union representatives walked away. (Tr. 815.)

2. Argument and Analysis

The ALJ found Crocker denied the Union access to new employees at orientation in violation of the Act. This finding is based on the ALJ's belief Crocker was "discourteous". The ALJ decided Crocker was not credible, but the facts are not in dispute. The ALJ further found that these actions undermined the status of the Union as the employees' collective-bargaining representative and caused a loss of employee support for the Union.

First, Valley did not deny the Union access to new employees. As explained above, the Union arrived for the first orientation in months at the wrong time. The two RNs *asked* Crocker if attending the Union's portion of orientation was mandatory and Crocker responded that it was not. (Tr. 814-15.) This testimony is uncontradicted. The RNs elected not to stay and left at the conclusion of Crocker's presentation. This testimony is also uncontradicted – both of the Union representatives confirmed that they did not hear any of the discussion between Crocker and the RNs. (Tr. 290, 332.)

The CBA required only that Valley provide the Union an *opportunity* to present during orientation. The uncontroverted evidence is that Valley complied with this obligation but that the RNs elected not to stay for the Union's presentation. Valley did not deny the Union access to these two RNs, and was not required to negotiate with the Union because it did not deviate from the obligations set forth in the CBA (or, from its past practice). *See Triple A Fire Protection, Inc.*, 315 NLRB at 414, *Derrico v. Sheehan Emergency Hospital*, 844 F.2d at 26, *House of the Good Samaritan*, 268 NLRB at 237, *supra*.

Further, there is no credible evidence this alleged conduct incident undermined the Union or caused a loss of support for the Union. There is no evidence anyone other than these two RNs were aware that they were supposedly prohibited from conducting orientation on one incident. And the undisputed testimony was that these two RNs specifically did not want to attend orientation and asked if it was mandatory.

E. <u>Valley Emergency Department</u>

The ALJ's finding that Respondent Melley unlawfully restricted Union access to bargaining unit members violated the Act was in error.

1. Facts

On Friday, January 27, Clinical Supervisor McDonald and Charge Nurse Shawn Melley encountered two Union organizers – Romina Loreto and Gloria Madrid – in the ED break room when it was time to begin a preshift meeting or huddle to discuss patients. (Tr. 279-80, 1004.) Melley asked the two Union organizers to leave, which they did. (Tr. 1005.) There were around 14-16 RNs and three techs in the break room at that time. (Tr. 1005.)

At the conclusion of the huddle, McDonald exited the break room and walked back to the charge desk. (Tr. 1005.) She did not see any Union organizers standing in the hallway, nor did she see Melley speak with either of them. (Tr. 1006.)

2. Argument and Analysis

The ALJ found that Shawn Melley instructed two Union representatives that they could not talk to more than two employees at a time in violation of the Act. The *undisputed* evidence from the hearing was that Melley *did not* prevent the Union organizers from meeting with any employees. Further, the Union representatives disputed Melley's statement and insisted the CBA allowed Union representatives to speak to more than two employees.

The Union's organizers testified that on January 27 they were in the ED break room speaking with employees shortly before the huddle began. (Tr. 279-80.) They claim that once the charge nurse entered to begin the huddle, they stepped out of the room to give the ED staff privacy during the huddle. (Tr. 280.) In fact, Loreto claimed that she voluntarily left the break room because she knew it would be inappropriate for her to remain during the huddle. (Tr. 297.)

Loreto claims that after she voluntarily left the ED break room, she and Madrid waited right outside the breakroom door until the huddle ended, at which time she and Madrid began walking away from the ED break room. (Tr. 280-81, 299.) She claims Melley approached her in the hallway and told her that she could only talk to one or two nurses at a time. (Tr. 281.)

Loreto responded immediately by saying "[N]o, that's not true, not according to my contract." (Tr. 281.) Loreto was not speaking with any nurses when Melley allegedly made this statement. (Tr. 300.) And, Loreto confirmed that she had never been prevented from speaking with more than two nurses at a time:

> Question: Had you ever not spoken with more than two RNs at a time because of this rule that was being discussed?
>
> Answer: Actually, we have. Like it, it has never been a problem like when you go to the breakroom and people are on break, if there's like four RNs there who have the same question like we address, you know whatever question they have like it has not been a problem for any of us to speak to more than one or two RNs at a time.

(Tr. 302.) Loreto confirmed that she *routinely* spoke with more than two RNs at a time.

The ALJ's finding is based on an exchange between a manager and Union representatives over a disagreement in interpretation of the CBA. The undisputed evidence is that Melley's statement made no impact on any behavior of anyone. There is no possibility of employee impact or impact on the Union's conduct. Therefore, the ALJ erred in finding Melley's statement violated the Act.

Moreover, there is no evidence this caused disaffection. Loreto confirmed that she *knew* that Melley's alleged "rule" was wrong, that he did not stop her from meeting with more than two RNs, that she "routinely" met with more than two RNs at a time, and that no RNs heard Melley allegedly tell her that she could not meet with more than two

RNs. The ALJ erred in finding a causal connection between this conduct and the Union's loss of majority support.

F. Desert Springs' IMC Break Room (Exceptions 1, 2, 4, 37)

The ALJ's finding that taking of union literature off a break room table violated the Act was error.

1. Facts

Carol Dugan is the Director of Intermediate Care ("IMC") and 2 East at Desert Springs Hospital and not Director of Nursing as found by the ALJ. (Tr. 636.) Each of Dugan's two units had a break room (the IMC break room and the 2 East break room). (Tr. 638-39.) Each time the Union planned to post a flyer, the Union sent the flyer to HR in advance, and HR then circulated an email to the directors along with a copy of the flyer, and a notice regarding whether or not the flyer was approved. (Tr. 639; R. 12.)

On October 11, Dugan and McNutt were in a meeting when Dugan received a call from her clinical supervisor, Bill Healey, complaining that two Union organizers in the IMC break room were giving him a hard time. (Tr. 642, 915-16.) Dugan and McNutt went to the IMC break room to investigate. (Tr. 642.) The Union organizers, Randall Peters, Jr. and Amelia Gayton, insisted that they had the right to post two flyers. (Tr. 642-43; 921.) They also had a large stack of the flyers on the IMC break room table. (Tr. 936.) One of the flyers advertised an upcoming picnic. (Tr. 614.) The other flyer was a bargaining update and stated "UHS IS DICTATING YOUR RIGHTS!" (Tr. 614, G.C. 19, p. 2.) Dugan and McNutt were unsure whether the flyers were approved, so they called Cassard, who was working in Desert Springs that day, to come to IMC and review the flyers. (Tr. 643, 916, 921.) When Cassard arrived, he asked the Union organizers for copies of the flyers to review; he and Dugan subsequently went into

Dugan's office (which is directly beside the IMC break room) so they could review the flyers and the CBA. (Tr. 643, 657.)

After reviewing the flyers and the CBA, Dugan left the area and Cassard spoke with the Union organizers. (Tr. 614, 658.) Cassard informed the Union representatives that the flyer advertising a picnic was approved, but that the other flyer, which accused Desert Springs of "dictating" RNs' rights, was critical of Desert Springs and was not approved. (Tr. 614.) Cassard gave the flyers to McNutt, who handed both of them back to the Union organizers. (Tr. 938.)

2. Argument and Analysis

The Complaint alleged that on or about October 11, 2016, Carol Dugan removed all items from the bulletin board in the Intermediate Care ("IMC") break room of Desert Springs. (G.C. Ex. 1(pp), para. 6(e).) CGC was allowed to orally amend the complaint to add an allegation that Dugan removed flyers from the IMC break room table.

The ALJ's finding is clearly in error. Dugan, McNutt, and Cassard each testified that Dugan did not remove *any flyers* from the Union's bulletin board. In fact, Dugan and McNutt testified that they *never even entered the break room*. (Tr. 646, 935.) Due to the configuration of the room, Dugan could not have removed a flyer from the bulletin board without entering the room. (Tr. 645-46.)

Moreover, Dugan also confirmed that she never picked up any flyers during her exchange with the Union representatives in October 2016:

> Question: Did you – did you ever pick any of those flyers up?
>
> Answer: If they were on the table – if there were flyers left on the table, those were picked up. And we were told to do that by HR.
>
> Question: Okay. Did you pick any up during this exchange?

Answer: No. They –

Question: Okay.

Answer: They were already gone when I come back from my meeting.

Question: Okay. So you didn't pick any up during this exchange that we're talking about right now?

Answer: No.

(Tr. 646-47.) Dugan specifically denied picking up any union flyers and there was no other evidence from any witnesses that she picked up any flyers from the table. The testimony is uncontradicted.

Even if Dugan had removed the Union's flyers from the bulletin board, the General Counsel's own witnesses confirmed that Cassard immediately returned to the Union the approved flyer advertising the picnic, which the Union posted. (Tr. 372, 558.) The other flyer, which accused UHS of "DICTATING" RNs' rights, was clearly critical of Desert Springs and was not approved under the CBA. (G.C. 19.) As explained in detail above, the long-standing practice was for Desert Springs to remove unauthorized postings. Therefore, even if the flyer were removed, the removal of this flyer would not violate the Act. *See Triple A Fire Protection, Inc.*, 315 NLRB at 414, *Derrico v. Sheehan Emergency Hospital*, 844 F.2d at 26, *House of the Good Samaritan*, 268 NLRB at 237.

There's no evidence this caused employee disaffection. This incident occurred in October 2016 – five months before Desert Springs withdrew recognition. There were, at most, two bargaining unit employees who witnessed this incident. Isolated incidents involving just a few employees do not support a finding that the withdrawal was tainted. *See Champion Enterprises, Inc.*, 350 NLRB 788, *20. Again, the removal of materials

from a Union's bulletin board has specifically been found to not cause employees to vote to decertify. *See Renal Care of Buffalo, Inc.*, 347 NLRB at 1284.

G. Desert Springs' 2 East Break Room (Exceptions 1, 2, 5, 8, 37)

The ALJ's finding that Dugan's actions had a chilling effect on the exercise of Section 7 rights and was a unilateral change was in error.

1. Facts

In February 2017, while Dugan walked past the 2 East break room, she observed through the window that former employee and current Union organizer Katrina Alvarez Hyman was in the room. (Tr. 648.) Dugan saw Alvarez Hyman speaking to two CNAs and two RNs, including one CNA who was sitting directly in front of Alvarez Hyman at the small table. (Tr. 648-49.) Alvarez was standing and gesturing while she spoke. (Tr. 339.)

The CBA restricts the reasons that Union organizers may meet with employees, and specifically prohibits representatives from organizing non-bargaining unit employees. (G.C. 13, p. 8.) Article 3, Section C, of the Desert Springs RN Unit CBA states:

> The above access rights shall be limited to official union business related to the bargaining unit and shall not be used to engage in union organizing activity, solicit, or distribute literature to non-bargaining unit employees.

(G.C. 13, p. 8.)

In 2016, the Union initiated a campaign to represent Certified Nursing Assistants at Desert Springs, and Alvarez Hyman had been a "lead" organizer. (Tr. 652.) Moreover, during the contract negotiations the Union's lead organizer, Bruce Boyens, informed Desert Springs's bargaining team that the Union specifically wanted access to the hospital to try to organize. Dugan, who was on Desert Springs's bargaining team

testified that during the most recent round of bargaining, the Union's chief spokesperson confirmed that the Union was trying to organize other employees:

> There was a – a conversation regarding access and there was going to be a change in – a proposed change in the contract. And there was kind of a little bit of an argument back and forth about why we would want to limit access. And it was said that, "because you're in there trying, you know, to organize." And the lead organizer for the Union said, "Hell yes that's what we are in there for."

(Tr. 653.) Alvarez Hyman admitted she had been "heavily" involved in trying to organize CNAs at Desert Springs in the past. (Tr. 359-60.)

Dugan was rightfully concerned when she saw Alvarez Hyman speaking with CNAs in the break room in February. (Tr. 662.) As she explained, Alvarez Hyman was "holding court" and gesturing with her hands, and the CNAs, one of whom was sitting at the small table directly in front of her, were staring right at her. (Tr. 648, 663, 667.)

Accordingly, Dugan opened the door and said:

> Excuse me. There are unrepresented employees in the room. And I request that you wait until they leave – finish their break and leave before you continue.

(Tr. 651.) Alvarez Hyman responded by putting her hand up in a stopping motion and the other organizer, Natalie Hernandez, stated: "We have a right to talk to whoever we want." (Tr. 648.) Dugan then closed the door and left. (Tr. 651.) She never told the Union organizers that they had to leave. (Tr. 651.) She did not call, or threaten to call, security. (Tr. 651.) Nobody left the room during her exchange. (Tr. 651.) The entire exchange lasted less than a minute. (Tr. 651.) Dugan also explained that her voice was not raised because she was trying to be respectful of patients in nearby rooms. (Tr. 651-52.)

2. Argument and Analysis

The ALJ found Dugan's actions violated the Act by having a chilling effect and by imposing a unilateral change in violation of §8(a)(5) and (1). There is no dispute that when Alvarez Hyman was addressing employees in the IMC break room on February 15, there were non-bargaining unit employees standing and sitting around her at the small table in the break room. Alvarez Hyman confirmed that a CNA and unit secretary (who was also a non-bargaining unit employee) were seated at the table in the break room. (Tr. 345.) There is also no dispute that under the CBA, union organizers were not permitted to speak with non-represented employees. Alvarez Hyman confirmed this interpretation of the CBA. (Tr. 363-64.)

Dugan knew that Alvarez Hyman had been very involved in trying to organize CNAs in the past. When she saw Alvarez Hyman speaking to non-bargaining unit employees in the break room in February 2017, she opened the door and reasonably requested that Alvarez Hyman not speak to the non-bargaining unit employees. After she made this request, she closed the door and walked away. The entire conversation lasted for less than one minute. (Tr. 651.) She never "barred" the Union representatives from speaking to anyone. Dugan credibly testified that nobody left the break room during this brief exchange. (Tr. 651.) After she left, the Union organizers continued meeting with RNs. (Tr. 338.) Dugan's request was consistent with the CBA and the parties' past practice and did not violate the Act. *See Triple A Fire Protection, Inc.*, 315 NLRB at 414, *Derrico v. Sheehan Emergency Hospital*, 844 F.2d at 26, *House of the Good Samaritan*, 268 NLRB at 237.

The ALJ discredited Dugan because she didn't confront Alvarez. She was "polite." Therefore, the ALJ discredited her. Unlike Crocker who was not credited

because she was "discourteous." Apparently if Dugan would have confronted Alvarez the ALJ would have credited her. These credibility reasonings make no sense.

Further, the evidence fails to show how this isolated incident caused a loss of majority support for the Union. According to the testimony there were, at most, two bargaining unit employees who witnessed this incident. Isolated incidents involving just a few employees do not support a finding that the withdrawal was tainted. *See Champion Enterprises, Inc.*, 350 NLRB 788, *20. Moreover, this was not the type of incident that would cause disaffection. The incident involved one supervisor instructing one former employee to postpone a conversation because she was concerned about the Union engaging in solicitation of non-bargaining unit employees.

H. Mark Smith (Exceptions 1, 2, 21, 22)

The ALJ's finding that Mark Smith was Respondent Desert Springs' agent is error.

1. Facts

Mark Smith was a staff RN at Corona Regional Medical Center in Corona, California. (Tr. 707.) Corona Medical Center decertified an RN unit in February 2016. (Tr. 64.) At the end of February or early March 2017, Farese contacted a man named Sherwood Cox, who operates an anti-union website, because she was being bullied and harassed due to her decertification efforts. (Tr. 499, 501, 898.) Cox connected Farese with Smith because Smith had recently undergone a similar effort. (Tr. 499, 898.) Smith agreed to come to Desert Springs for a few days to assist Farese. He primarily solicited employees in the cafeteria and in the foyer at the main entrance to Desert Springs during shift changes.

On March 6, Smith sat at a table in the cafeteria with an anti-union sign and a stack of flyers. (Tr. 507-08; G.C. 6.) John Archer, who was an employee of the Union, arrived in the cafeteria and began speaking with Smith at Smith's table. (Tr. 406, 445.) Archer also photographed Smith. (Tr. 431.) Smith then packed up his things and moved to a different table, away from Archer. (Tr. 445.) Archer followed Smith to the second table, summoned hospital employee Meghan Bell (who was in the cafeteria on her day off of work solely to solicit for the Union), and set up beside Smith at the second table. (Tr. 445, 469.) At that point, Smith called Farese and asked her to contact security because he was being harassed. (Tr. 445, 504.)

McNutt and Schmid learned about the commotion taking place in the cafeteria. (Tr. 89, 197-98.) When McNutt and Schmid arrived, security was already there. (Tr. 90.) Archer was sitting at the table with Smith. (Tr. 199.) Schmid asked Archer and Smith to stay apart from each other and, as Archer had followed Smith on two occasions, asked Archer not to harass Smith. (Tr. 200.)

In addition to setting up in the cafeteria during lunch, Smith set up a table in the foyer of the main entrance to speak with RNs during shift changes. Smith brought a sign, several flyers, and a laptop computer. (G.C. 6.) In response to Smith setting up in the foyer, Union organizers Barry Roberts and Archer set up a table in the main lobby of Desert Springs on March 7-8. (Tr. 385, 390-91.) Smith was already set up in the lobby before Roberts and Archer arrived and the Union specifically set up in the lobby because Smith was there. (Tr. 388-89.) After the incident with Archer in the cafeteria, Smith brought a small camera into the hospital in order to record the Union organizers who harassed him. (Tr. 509.) He only recorded when the Union organizers were present. (Tr.

509-10.) Archer took pictures and videos of Smith as well. (Tr. Tr. 395, 421; G.C. 6.) Roberts and Archer notified security, who then spoke with Smith, and Smith turned off his camera. (Tr. 388.)

2. Argument and Analysis

a. Desert Springs Responded Reasonably to Archer's Harassing Behavior in the Cafeteria

The ALJ found Smith was Desert Spring's agent, engaged in unlawful surveillance and that provided Smith with more than ministerial aid that tainted the decertification effort.

As explained above, the undisputed evidence demonstrated that on March 6, the Union's representative, Archer, repeatedly followed Smith around the cafeteria in order to harass Smith. The testimony from Smith, Archer, and Bell demonstrated that Smith was sitting on his own when Archer approached him. Smith did not make a scene. He did not argue with Archer. Instead, he simply moved to another table. Archer then followed him to the new location and summoned Bell to join him there. At that point, Smith understandably felt harassed by Archer, so he called Farese to summon security. Smith explained: "Well, I called Courtney [Farese] and I asked someone to call security because the guy was harassing. Every time I'd move, he'd come over to the table where I'm at and start talking stupid stuff. And I asked security to – someone to call security because he kept following me." (Tr. 504.) At that point, Schmid and security arrived and Schmid separated Smith and Archer. (Tr. 504.)

To avoid additional confrontation, Schmid asked Archer and Smith to separate. And as it was *Archer* who had followed Smith on two prior occasions, Schmid asked Archer to stop harassing Smith. In doing so, Desert Springs did not create an "overly-

broad and discriminatory rule or directive prohibiting its employees who support the Union from being near individuals soliciting and distributing materials in opposition to the Union" or "provide more than ministerial assistance to employees in removing the Union" as their representative. Desert Springs simply wanted to maintain peace and order in the cafeteria and it was the *Union representative* who was following and disturbing Smith.

b. Smith Was Not an Agent of Desert Springs

The ALJ found that Desert Springs, through Smith, engaged in unlawful surveillance and solicited employees to sign decertification cards. (G.C. Ex. 1(pp), para. 6 (l) - (m).) As set forth below, Smith was an RN at Corona Medical Center. He is not a manager or supervisor nor was he an agent for Desert Springs. Therefore, his conduct cannot be attributable to Desert Springs.

(1) Smith Came to Desert Springs on His Own Accord and Without Assistance from Desert Springs

An employer is not liable for the conduct of a third-party unless the conduct can be attributed to the employer. *See, e.g., Dean Indus., Inc.*, 162 NLRB 1078, 1092 (1967). Here, Desert Springs did not solicit, fund, or subsidize Smith in any way. Desert Springs did not instruct or ask Smith to set up a table. Smith came to Desert Springs on his own volition.

Further, Desert Springs' CEO testified that he did not have any advance knowledge that Smith would be at Desert Springs. (Tr. 315.) In fact, he testified that when he saw Smith in the cafeteria he asked counsel for the hospital whether he could be there. (Tr. 315.) Smith also testified that he did not speak with anyone in management at Desert Springs prior to arriving in March 2017. (Tr. 501.) The first time he spoke with

anyone in management was when he called security because Archer was harassing him in the cafeteria. (Tr. 503.)

The ALJ found Smith received a free lunch. There is no evidence of that finding. In fact, CGC confirmed that the lunch log entered into evidence was merely an *example* of a lunch log. (Tr. 450.) CGC never connected any of those signatures to Smith. Moreover, even if Smith had signed a lunch log, Desert Springs had not authorized him to do so. The ALJ's finding is in error.

(2) Desert Springs Permitted Smith to Solicit on Hospital Property to Comply with Its Settlement Agreement with the NLRB and Not To Provide Assistance to the RN's Decertification Effort

The ALJ found Desert Springs aided Smith by providing him special access under the hospital's solicitation and distribution policy. However the ALJ failed to address the NLRB Settlement Agreement regarding access by UHS employees. Smith was employed by an affiliate of Desert Springs, and thus was not an "employee" of VHS. However, as Schmid explained during the hearing, based on recent case law and a settlement agreement that UHS reached with the NLRB, she believed Desert Springs was required to allow Smith to engage in solicitation and distribution.

In October 2015, UHS entered into a settlement agreement with Region 4 of the NLRB. (R. 19.) That settlement agreement arose out of an issue with two other UHS-affiliated hospitals: Brooke Glen Behavioral Hospital and Friends Hospital. (Tr. 709.) Employees from Brooke Glen Behavioral Hospital went onto the property of Friends Hospital. Friends Hospital tried to remove the Brooke Glen Behavioral Hospital employees from its property and the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) filed a ULP charge against UHS. (R. 19.) In order to resolve

that charge, UHS agreed that it would not deny "any of [its] off-duty employees, regardless of which of our facilities the employees are assigned to work at, access to [its] parking lots and other outside non-work areas at [its] facilities…." (R. 19, p. 3.)

While the settlement agreement specifically refers to "parking lots and other outside non-work areas," that limitation was only because the facility at issue in the settlement agreement was a secured mental health facility (not, as here, an acute care Hospital). (Tr. 709, 743-44.) Under established case law, off-duty employees are provided greater access for solicitation and distribution than non-employees. Specifically, an employer can prohibit non-employees from soliciting and distributing on its property, but generally cannot prohibit off-duty employees from soliciting and distributing in non-work areas. *See, e.g., Town & Country Supermarkets*, 340 NLRB 1410, 1413-1414 (2004) ("The critical distinction is that employees are not strangers to the employer's property, but are already rightfully on the employer's property pursuant to their employment relationship, thus implicating the employer's management interests rather than its property interest. . . . In sum, under *Republic Aviation*, *supra*, off-duty employees may engage in protected solicitation and distribution in nonwork areas of the employer's property.") This includes "parking lots and other outside non-work areas" but also inside non-work areas so long as the solicitation and distribution does not disrupt patient care. *See, e.g., Harper-Grace Hospitals*, 264 NLRB 663, 665 (1982), *enfd*. 737 F.2d 576 (6th Cir. 1984). In 2015, Region 4 issued a decision requiring an employer to allow off-duty employees to distribute flyers and wear signs *inside* the lobby of the hospital. *Crozer Chester Med. Ctr.*, 2015 NLRB LEXIS 355, *34 (NLRB May 13, 2015).

In light of the recent case law – and in particular the settlement agreement that clarifies access rights for employees of other UHS affiliates – Desert Springs determined that it was obligated to allow Smith to handbill in the foyer and cafeteria of the hospital. (Tr. 708-09.) While the Hospitals had not yet updated their policy, since entering into the settlement agreement UHS's practice was to allow employees from other UHS-affiliated hospitals to solicit and distribute literature in public areas "anytime it came up." (Tr. 746.)

c. Smith Did Not Engage in Unlawful Surveillance

The ALJ further found that Desert Springs, through Smith, engaged in surveillance by recording employees approaching Union representatives in the lobby and cafeteria, and by doing so provided more than ministerial assistance to employees in removing the Union as their collective-bargaining representative.

As set forth above, Desert Springs is not liable for this conduct because Smith was not acting as its agent. But even if he was, the allegations attributed to Smith do not amount to unlawful surveillance under Section 7. Smith was sitting in the Hospital's cafeteria and lobby, which is a public space. Visitors, employees, and management all sit and eat in the cafeteria. The Union's conduct was out in the open – on the Hospital's property – for anyone in the cafeteria to observe. Observation of a union in a public cafeteria does not violate Section 7. *See, e.g., Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005).

Union representative Archer confronted Smith upon his arrival at the Hospital. Archer moved repeatedly to the same cafeteria table as Smith. Security was summoned to the cafeteria to deal with these interactions. Clearly, there is undisputed objective evidence to find Smith's recording objectively reasonable.

I. Act Training (Exceptions 1, 2, 10, 11, 12, 13, 14, 15)

The ALJ's finding that Schmid's promise of a wage increase, expression of futility in bargaining and Reyes' comments about better administrators violated the Act was error.

1. Facts

Schmid is the Staff Vice President, Labor Relations for Universal Health Services ("UHS"). (Tr. 52.) Schmid is responsible for overseeing collective bargaining negotiations and contract administration for all of UHS' facilities. (Tr. 53.) She has held this position since November 2013. (Tr. 705.) Schmid practiced labor law and then became a labor consultant in 1998. (Tr. 706.) Since 1998, she has exclusively worked in labor relations. (Tr. 706.)

"Act Training" is training that Schmid provided to employees on the National Labor Relations Act. (Tr. 710-11.) Schmid uses a pamphlet issued by the NLRB to assist with the training. (Tr. 711; R. 20.) Act Training lasts approximately one hour. (Tr. 83.)

Schmid began Act Training at Valley in February 2017 after Valley received notice that an employee had filed a decertification petition with the NLRB. (Tr. 711.) Training was always held in a small classroom on the third floor of the hospital, near the behavioral health unit. (Tr. 711, 713, 717.) The classroom had approximately 12-15 seats and a whiteboard. (Tr. 713.) Management signed up RNs to attend based on the needs of each manager's particular unit. (Tr. 714.) Schmid's goal was to meet with all of the RNs, but the meetings ended after withdrawal. (Tr. 84.) Windi Reyes was a nursing director at Corona Regional Medical Center. (Tr. 712.) Reyes attended two or three of the Act Training sessions conducted by Schmid. (731.)

2. Argument and Analysis

The only evidence relied upon by the ALJ was the testimony of one witness – Sue Anne Komenda. Komenda was an RN at Valley who claims that she attended one Act Training meeting, which occurred in late January or early February 2017. (Tr. 523.)

Komenda testified in September 2017 solely based on her recollection of what occurred during the meeting. Komenda has no background in labor relations.

Schmid, on the other hand, has extensive experience in the field of labor law. Schmid is responsible for overseeing collective bargaining negotiations and contract administration for numerous facilities. (Tr. 53.) Schmid routinely presents Act Training at various facilities. (Tr. 710-11.) She presents the training without any notes, solely from memory, and the only material she uses is the NLRB's pamphlet. (Tr. 711; R. 20.) Schmid is very familiar with the Board's rules on what employers can and cannot say to employees, in particular the acronym "TIPS" – which is commonly used to remind employers about the prohibitions on making threats, engaging in interrogation, making promises, or engaging in surveillance. (Tr. 730-31.)

Schmid is a much more credible witness than Komenda regarding what transpired during Act Training. What Komenda allegedly "heard" versus what Schmid said is critical to determining what transpired. There was no motivation for Schmid to violate the Act. The RNs had filed a decertification petition. There is no way Schmid would jeopardize an election.

Schmid expertly laid out each party's bargaining obligations, the legal principles of good faith bargaining, *status quo*, impasse, and other complex labor law principles. However, Komenda claims that during Act Training Schmid made a number of remarks that (1) blatantly violate the NLRA (with respect to bargaining, "they were just going to

drag it out and drag it out until the union relented") and (2) are nonsensical (stating that once parties reached impasse, an employer could decertify a union). (Tr. 526.) Komenda also attributed statements to Schmid that Schmid credibly explained were simply factually wrong (alleging that employees at a hospital in Philadelphia did not receive wage increases during negotiations when, in fact, those employees had steps built into their CBA and did receive wage increases during bargaining). These examples are analyzed in detail below and demonstrate that Schmid's testimony regarding what she said during Act Training is much more credible than Komenda's testimony.

a. Valley Did Not Tell Employees that It Would Be Futile for Them to Retain the Union as Their Bargaining Representative

The ALJ found that Valley told employees that it would be futile for them to retain the Union as their bargaining representative.

First, Komenda claimed that Schmid threatened to prolong bargaining and effectively engaged in Bulwarism:

> Komenda: "[B]argaining would go on and on and on and that while bargaining was going on, they would stretch it out to a long length of time and during that time, we would not get any raises." (Tr. 525.)
>
> "UHS' side of it was not going to give anything unless they got something and they certainly weren't going to give anything unless they got everything that they wanted…." (Tr. 526.)

Schmid specifically denied saying that the Hospital would "stretch" negotiations: "I would never use the word 'stretch' and no one was trying to extend negotiations. Nobody more than I wanted to be finished with negotiations." (Tr. 728.) Rather, she explained, in detail and using the NLRB's own publication, the legal contours of the bargaining process. (Tr. 540; R. 20.) Schmid identified mandatory subjects of

bargaining, discussed the obligation to bargain in good faith, and explained that the law does not compel *either* side to agree to a demand. (Tr. 721.)

Schmid used a whiteboard in the room to explain bargaining. She drew arrows that represented the direction of proposals by the employer and the Union to show that each side works toward one another to reach an agreement and that the end result can be more, less, or the same as what the employees currently have. (Tr. 723.)

Next, Komenda claimed that Schmid informed employees that at two other UHS affiliated hospitals, the employers' effectively prolonged negotiations until they "no longer had a union."

> Komenda: "She gave an example of a hospital in Philadelphia where they bargained and bargained and bargained for years and no one was getting any raises during all that bargaining and they would just bargain until impasse and they would eventually get what they wanted, which was to have no union." (Tr. 526.)
>
> "That the hospital in Philadelphia had bargained for three years already and still had not – they were waiting – they were just going to drag it out and drag it out until the union relented. And that the same thing happened to a hospital in Massachusetts and that hospital [sic] did relent and they no longer had a union." (Tr. 527.)

As Schmid explained, Komenda's account of both the Philadelphia and Massachusetts hospitals were factually wrong. For example, employees in Philadelphia *did* receive wage increases during negotiations because steps were built into that collective bargaining agreement. (Tr. 742.) With respect to Massachusetts, Schmid would not have made the statement attributed to her because the hospital and union *did* successfully reach an agreement and the union continues to represent those RNs. (Tr. 724.)

Komenda's statement is also dubious as it implies that Schmid informed employees that Valley's goal was to prolong bargaining to reach impasse, at which point there would "no longer be a union." Of course, the concept of impasse is completely unrelated to decertifying a union, and it is unbelievable that Schmid – a veteran labor relations employee – would make this kind of blatantly inaccurate statement.

Rather, Schmid explained what she *did* tell employees about impasse:

> That both parties can bargain. And if they can't reach an agreement, that it's very rare, but occasionally, if there's not agreement to be reached, and both sides feel like they've fully bargained and can bargain no further, then impasse can be declared. And at that point, the hospital or the company would implement their final offer that was on the table at the time of impasse. And at that point, the Union still has choices. And their choices would be to take it and sign a contract, or not to take it. And work without a contract, or to strike. And that's typically the process of impasse. But that it was rare.

(Tr. 729.) Schmid confirmed that Valley Hospital was "not anywhere near an impasse." (Tr. 729.) She mentioned impasse because there was a misconception among employees that there is a way to force agreement when that is not required under the NLRA. (Tr. 734-35.)

Employees frequently asked why bargaining was taking so long, so Schmid also explained that the length of negotiations is unpredictable. (Tr. 722.) Schmid explained that part of the reason for a delay in bargaining at Valley was that the SEIU was not prepared:

> [P]art of the slowness of bargaining was that the Union was often not prepared for bargaining. They didn't have a printer. They didn't have a computer. They didn't come with written counters. I think in a lot of respects, they expected us to write their counters for them. And it was – it was a very long slow process, in large part because of that.

(Tr. 722.) This evidence is not in dispute.

In short, Schmid provided a detailed explanation of the bargaining process, including the obligations of each party to bargain in good faith and how the law does not require either party to agree to a proposal. Schmid accurately stated that the length of bargaining is unpredictable, and explained why bargaining had taken nearly one year at Valley. Notably, the Union *never* filed a ULP against Valley alleging that Valley failed to bargain in good faith.

Section 8(c) of the Act states "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefits." 29 U.S.C. § 158(c). Here, Schmid expressly provided her opinion as to why bargaining was protracted. Schmid's conduct did not violate Section 8(a)(1) or (5).

b. Valley Did Not Threaten to Withhold Wage Increases if Employees Remained Unionized or Promise Wage Increases if Employees Decertified the Union

ALJ's finding that Schmid promised a wage increase is violation of this Act, is in error. To support these claims, Komenda testified that Schmid said that employees would not receive raises during bargaining and that market raises were provided to non-union hospitals:

> Komenda: "Well, the first thing she brought up was that there were not going to be any raises of any kind while bargaining went on." (Tr. 528.)
>
> Komenda: "Then she talked about market value raises that were offered only to – union hospitals got market value raises, nonunion hospitals did not get market

> value raises and that was the reason we did not get market value raises." (Tr. 528.)[7]

As Schmid explained, she often received questions about pay – and specifically why Valley had not agreed to the Union's interim wage proposal. (Tr. 725.) Schmid explained that during bargaining you typically start with non-economic proposals (discipline, attendance, hour of work, etc.) and once you have a picture of the agreement, then move onto wages. (Tr. 725.) She also received questions about why employees' wages were below other non-union hospitals in VHS. (Tr. 725.) Schmid explained the pros and cons of discretionary merit-based pay (as exists in non-union facilities) versus having wages negotiated in a CBA. At non-union facilities, wages were based on a combination of market adjustments and merit increases whereas wages at the union facilities were set forth in a CBA. (Tr. 726.) She pointed out that guaranteed wages could be better or worse than the merit and market-set wages. For example, during the recession, employees at the non-unionized facilities did not receive wage increases for years while the unionized facilities did. (Tr. 726.) "An employer has a right to compare wages and benefits at its nonunion facilities with those received at its unionized locations. The Board has repeatedly held that providing such information is not unlawful." *Langdale Forest Products*, 335 NLRB 602 (2001) (citing, *TCI Cablevision of Washington*, 329 NLRB 700 (1999); *Viacom Cablevision*, 267 NLRB 1141 (1983)).

Schmid's Act Training is analogous to the (lawful) speech set forth in *Langdale Forest Products*. There, the Board criticized the dissent for its "unwillingness to accept the principle that an employer has a right to make comparisons or descriptions that are unfavorable to an incumbent union during a decertification election campaign":

[7] Presumably Komenda meant to say that *non-union* hospitals received market value raises and that *unionized* hospitals did not receive market value raises.

> For example, the dissent finds an implied promise in the Respondent's express disclaimer of the intent to make any promises. It infers a promise to pay employees more, in the absence of a collective-bargaining representative, from an accurate description of the statutory obligation to bargain instead of taking immediate unilateral action. It suggests illegality in an accurate comparison of the wage rate history of the Respondent's unionized plant with its nonunion plant and in an apparently accurate description of the Union's willingness in past negotiations to accept below-average wages.
> …
>
> In sum, the dissent's approach signals a fundamental unwillingness to accept the principle that an employer has a right to make comparisons or descriptions that are unfavorable to an incumbent union during a decertification election campaign.

Id. at 603.

Schmid also explained why Valley rejected the Union's interim wage proposal. In that proposal, the Union sought market adjustment for nurses plus the top range for merit increases for every employee. (Tr. 727.) This far exceeded what was provided for at the non-unionized facilities as employees in those facilities received merit pay based on their performance within a range (*i.e.*, clearly, not all of the employees at non-union facilities were placed at the top of the pay range). (Tr. 727.) While Schmid explained why Valley rejected this proposal, she did not say that "there were not going to be raises of any kind while bargaining went on." Schmid's comments did not violate the Act.

c. Encouraging Employees to Vote Against the Union Did Not Violate the Act

ALJ's finding that, Valley, via Reyes and Schmid, encouraged its employees to withdraw support for, and decertify, the Union is error. "[I]t is well settled that, absent threats or promise of benefit, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees, in an effort to convince them that they would be better off without a union." *Langdale Forest Products*, 335 NLRB at 602 (*citing Custom Window Extrusions*, 314 NLRB 850 (1994); *Fern Terrace Lodge*, 297

NLRB 8 (1989)). *Langdale* specifically addressed comments made shortly after a petition to decertify the union was filed. *Id.*

Komenda claimed that Reyes said:

> Well, she talked about that her -- the administration at her hospital wasn't doing a very good job of helping the employees out. And so what the hospital employees did was voted in a union. But then once the union got in there, they weren't happy with the union. So she had told them that they could vote the union out, and they did. So they voted the union out and then they got a better administration because better administrators only go to nonunion hospital -- yeah, only go to nonunion hospitals, that union hospitals were restricted in getting good administrators because those administrators could not do what they wanted to do. They had to go through the union.

(Tr. 530.) Once again, this statement is nonsensical – according to Komenda's own account, Reyes said that Corona's administration was bad *before* the Union arrived, so it would be illogical to infer that having a union improved administration. Nonetheless, setting aside that the alleged threat is a non-sequitur, the statement that good administrators only go to nonunion hospitals is not an unlawful threat.

J. Information Requests (Exceptions 9)

1. Facts

On December 7, 2016, the Union sent the Hospitals a request for information (the "December Request." (Tr. 1025-26; R. 46.) The December Request sought, among other information, a list of current bargaining unit employees, including "names, dates of hire, rates [of] pay, job classification, last known address, phone number, email address, dates of completion of any probationary [period], and Social Security number." (R. 46, p. 4.) The Union gave the Hospitals 23 days to respond – through and including December 30, 2016. (R. 46, p. 4.) There is no allegation that the Hospitals failed to adequately and timely respond to the December 7, 2016 requests.

On January 31, after the decertification petition was filed, Boyens sent Cassard an email requesting "the employee job classification, name, address, telephone number(s), email or other electronic address and the department where the employee works." (G.C. 21.) Boyens demanded that the Hospitals respond within one week – by February 6. Boyens request was for *all* current employees in *each bargaining unit* at Desert Springs and Valley. This request covered over 1000 employees. (*Id.*)

On February 6, Keim responded to the Union's request for information. (Tr. 1029.) Keim reminded Boyens that just one month earlier the Hospital had provided the Union with the majority of the information sought by the Union in its January 31 request for information. Keim informed Boyens that the Hospital would provide the information requested by the Union, but said that he could not meet the Union's unreasonable deadline of one week to produce this information. Specifically, Keim stated:

> The January 31, 2017 requests seek additional information including employees' cell telephone numbers and personal e-mail addresses. Of greater concern is the Union's requested date for providing the information, which is February 6, 2017. The Hospitals will work on providing the information, but will not meet the deadline which we believe is unreasonable.

(G.C. 34.) The Union never objected to the Hospital's statement that it needed additional time to respond.

Keim intended to respond by February 23, which was 23 days after the Hospital received the information request and the same amount of time that the Union provided to the Hospitals to respond to the similar December Request. (Tr. 1033.) On February 23, Keim responded on behalf of Desert Springs and provided the Union with the information that it requested. (Tr. 611, 1036-37; R. 47, 49, 50.) Valley did not respond

to the request because it had withdrawn recognition from the Union on February 17. (Tr. 1030.)

Compiling the information requested by the Union in such a short period of time was an onerous task, and the information was not complete prior to Valley's withdrawal. (Tr. 1031.) The information necessary to complete the document was gathered from a number of sources, including the Hospitals' HR system (Lawson), the scheduling system (ShiftHound), and the applicant tracking system (HRSmart). (Tr. 682-83, 700, 1032.) Pulling this information required Thorne to work with several other people, including a ShiftHound expert and people in the recruiting department. (Tr. 683.)

Thorne began with Lawson, which had the majority of the information requested by the Union, but only had one field for a phone number, and it did not specify whether this was a home phone or cell phone. (Tr. 683-84.) Lawson also had very few personal email addresses – for most employees that field was empty. (Tr. 684, 700.) Thorne supplemented the Lawson list with information from ShiftHound. ShiftHound had multiple phone number fields and identified whether the numbers were personal or cellular phones. (Tr. 684.) It also had personal email addresses. (Tr. 684.) Where there were empty fields after adding information from ShiftHound, Thorne supplemented the list with any information contained in HRSmart. This entailed a manual comparison of the information compiled in the Excel document against the information contained in applicant tracking system for nearly 500 employees. (Tr. 685-86.) This was a very labor-intensive process that involved Thorne, a ShiftHound expert, staff from recruiting, an administrative assistant from nursing, and Thorne's HR staff. (Tr. 686.)

After compiling all of that information, the Hospitals had to track down information from directors and managers – in particular, cellular phone numbers, email addresses and shift information. (Tr. 687, 1032, 1085.) Thorne reached out to six or seven managers to obtain information on 20-25 RNs. (Tr. 701-02.) While the Union did not request the shift information, the Hospital gathered that information because it would be required in the Voter List. (Tr. 1085.) Tracking down information from managers was particularly challenging because the directors (who were tasked with tracking down the information) worked Monday through Friday, but they needed information from some of their direct report managers, who only worked three days per week (for example, Friday through Sunday). (Tr. 1085.) And, this validation process did not begin until Valley already had all of the information from Lawson, ShiftHound, and HRSmart, which took a substantial amount of time. (Tr. 1032, 1085-86.) It took weeks to prepare responses to the Union's information request. (Tr. 1038.)

2. Argument and Analysis

a. Valley Attempted to Respond to the Union's Information Request in a Timely Manner

The Complaint alleges that Valley Hospital failed and refused to furnish the Union with a list that included Valley Hospital's RN's names, employees' job classifications, addresses, telephone number(s), email addresses, and departments. (G.C. Ex. 1(pp), para. 7(f)-(i).)

Under well-established law, once an employer lawfully withdraws recognition, it is no longer obligated to provide a union with requested information. *See, e.g.*, *In Re Champion Enterprises, Inc.*, 350 NLRB 788, 793 (2007) ("Following a lawful withdrawal of recognition, an employer no longer has a duty to provide a union with

requested information."). This is so even when the union requests the information prior to withdrawal. In *Champion Enterprises*, the union requested information on February 14, 2002. *Id.* at 792. On March 6, 2002 the employer stated that it would provide the requested information, but stated it would take until at least April 20, 2002 to respond. *Id.* at 792-793. The Union did not object to the additional time. *Id.* at 793. On April 18 – two days before the date on which it committed to providing the requested information – the employer withdrew recognition. *Id.* Reversing the ALJ, the Board held that the employer did not violate the Act by failing to respond to these requests, as the employer was not obligated to respond once it withdrew recognition of the union. *Id.*

Here, the facts are virtually identical to those in *Champion Enterprises*. The Union made a request for information on January 31. (G.C. 21.) Valley responded saying that it was working on the request, but could not meet the Union's unreasonable deadline of February 6. (G.C. 34.) The Union did not object to Valley's statement that it needed additional time. In the meantime, on February 17, Valley withdrew recognition from the Union.

Valley did not unreasonably delay its response to the Union's request for information. The Union demanded information relating to more than 1000 employees between two hospitals, including more than 500 employees at Valley. The Union demanded this information within one week without providing any explanation or justification for why it needed this information so quickly. Valley responded to the Union's demand within a week and notified the Union that it could not meet the Union's unilaterally set deadline. Valley began compiling the requested information.

The ALJ's position is that the Hospital could have provided information in response to the Union's information request. However, as Keim explained, Respondents' Exhibit 48 was not complete. (Tr. 1066.) Preparing the Voter List was an evolving process that required several steps – gathering information from multiple HR systems that could not "talk to each other." (Tr. 685-86.) This required manually entering information into an Excel document from the payroll system (Lawson), the scheduling system (ShiftHound), and the applicant system (HRSmart), and then ultimately tracking down individual managers.

Further complicating the process, some employees' names were entered into the systems differently. (Tr. 685.) This was a very labor-intensive process that involved Thorne, a ShiftHound expert, staff from recruiting, an administrative assistant from nursing, and HR staff. (Tr. 686.) All of this was, of course, in addition to the normal work performed by HR – they could not drop everything to respond to the Union's request. (Tr. 686.) This process took weeks. The list was not complete by February 17. A cursory review of Respondent Exhibit 48 shows that it is still missing data – in particular, Valley was tracking down the home phone, cell phone, and personal email addresses of employees. (R. 48.) An incomplete or piecemeal response would have resulted in ULP charges.

Moreover, Desert Springs provided the information requested within 23 days. (Tr. 162.) The Union never filed a ULP alleging that this 23-day response time was unreasonable – particularly given that it provided the Hospitals 23 days to respond to its December request. This is further evidence that Valley's inability to provide detailed information on 500 employees within just 17 days was justified.

b. Valley's Lack of Response to the Union's Information Request Did Not Cause Disaffection

The ALJ found the conduct set forth above caused a loss of employee support for the Union. (GC Ex. 1(pp), para. 7(m).) There is no evidence that *any* employees were aware of this failure to respond. No employees testified that they signed decertification cards based on the Hospital's failure to provide information. To the contrary, Valley had provided to the Union most of the information that it requested just one month earlier.

V. CONCLUSION

For all of the foregoing reasons, Desert Springs Hospital Medical Center and Valley Hospital respectfully submit that the ALJ's findings should be reversed in their entirety.

Submitted this the 16th day of November, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlrb.gov, and duly served electronically upon the following named individuals on this the 16th day of November, 2018.

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